

## EMPLOYMENT SERVICES ALERT

12/15/17

### The NLRB Makes Big Moves: Employee Handbooks and Joint Employers

By **Stephanie Olivera**, Associate

On Thursday, December 14, 2017, the National Labor Relations Board (NLRB) published two significant decisions affecting employers across the country. The first decision addressed the standard of review for employee handbook policies and the second decision addressed the standard for determining joint employer status. Both of these topics have been the subject of controversial decisions from the Obama-era NLRB.

First, the NLRB in a 3-2 decision involving *The Boeing Company* (365 NLRB 154), overturned its 2004 *Lutheran Heritage Village-Livonia* (343 NLRB 646) (*Lutheran Heritage*) standard, which provided that workplace policies violate the National Labor Relations Act (NLRA) if they (1) were promulgated in response to union activity, (2) have been applied in the past to restrict the exercise of NLRA rights, or (3) would be reasonably construed by employees to prohibit NLRA-protected activity. The “reasonably construed” standard was used by the Obama-era Board, including in the *William Beaumont Hospital* case (363 NLRB 162 (2016)), to invalidate numerous handbook policies over the years on the basis that an employee could reasonably construe them to prohibit Section 7 activities.

Since 2004, employers have struggled to comply with NLRB decisions applying the *Lutheran Heritage* standard, which required them to alter and remove certain typical or standard policies from their employee handbooks. In its decision, the Republican majority, including Chairman Miscimarra, Kaplan, and Emanuel, recognized that the *Lutheran Heritage* standard was confusing for employers and employees alike and noted that courts were regularly overturning the NLRB’s rulings on this issue.

The Board’s most recent decision did away with the prior “reasonably construed” test and instead explained that the analysis would consider (1) the nature and extent of the rule’s potential impact on employees’ NLRA rights, and (2) the employer’s legitimate justifications associated with the rule. In addition, the NLRB distinguished three categories of rules: (1) those that are legal in all cases, (2) those that are legal on a case-by-case basis, and (3) those that are always illegal.

Under this new standard, it is important for employers to carefully consider the business justification for any workplace rule before it is implemented and that the rule is not meant to chill employees’ Section 7 rights.

Second, the NLRB overturned its 2015 *Browning-Ferris Industries* decision (362 NLRB 186), which held that two entities in a business relationship are joint employers even when one of them has only “indirect control” over the others’ employees. (365 NLRB 156). In *Hy-Brand Industrial Contractors and Brandt Construction Co.*, another 3-2 decision, the Board reinstated its “direct control” standard, which means that a company will only be deemed a joint employer if there is evidence that it has exercised direct control over employment terms of that employee. Under the prior employment standard, it was significantly easier for unions and workers to hold companies accountable for practices of contractors and franchisees.

For additional information or assistance as to any employee handbook or joint employer issue, please contact any of the listed Roetzel attorneys.

**Doug Spiker**  
Practice Group Manager,  
Employment Services  
216.696.7125 | [dspiker@ralaw.com](mailto:dspiker@ralaw.com)

**Karen Adinolfi**  
330.849.6773 | [kadinolfi@ralaw.com](mailto:kadinolfi@ralaw.com)

**Robert Blackham**

216.615.4839 | [rblackham@ralaw.com](mailto:rblackham@ralaw.com)

**Denise Hasbrook**

419.254.5243 | [dhasbrook@ralaw.com](mailto:dhasbrook@ralaw.com)

**Paul Jackson**

330.849.6657 | [pjackson@ralaw.com](mailto:pjackson@ralaw.com)

**Doug Kennedy**

614.723.2004 | [dkennedy@ralaw.com](mailto:dkennedy@ralaw.com)

**Stephanie Olivera**

330.849.6671 | [solivera@ralaw.com](mailto:solivera@ralaw.com)

**Nathan Pangrace**

216.615.4825 | [npangrace@ralaw.com](mailto:npangrace@ralaw.com)

This Alert is informational only and should not be construed as legal advice. ©2017 Roetzel & Andress LPA.  
All rights reserved.

For more information, please contact Roetzel's Marketing Department at 330.762.7725.